LAW ALTER VIEWS

Right to 'not to be returned': A different look

HASSAN FARUK

IN the last few weeks the Rohingya refugees catch the attention of the world community. Suddenly hundreds of people from neighboring Myanmar State are fleeing by boat through Naf river, which is the common coastal area between Bangladesh and Myanmar, into the south coasts of Bangladesh, particularly, St. Martin Island, Teknaf, Shahpori Island and Cox's Bazar areas because of persecution.

Rohingya issue is not, however, a new phenomenon for Bangladesh. In 1992 Bangladesh also granted shelter & supported the Rohingya refugees who came from neighboring State Myanmar.

In the present scenario government of Bangladesh decided the policy- not to welcome the Rohingya refugees in the territory of Bangladesh because of national security and over burdened of Rohingya refugees who have been staying in Bangladesh for more than 20 years. The United Nations, UNHCR, the media, eminent citizens and the political parties are addressing Bangladesh government to allow the Rohingya refugees in Bangladesh territory under humanitarian ground at least for temporary period. The pressure group also caution, if Bangladesh does not welcome the Rohingya refugees then Bangladesh will violate the principle of non-refoulement of international refugee law, which the customary international law.

The principle of non-refoulement is the customary international law but there are exceptions as well. Moreover, the Rohingyas are boat refugees, i.e. arrival of asylum seekers by boat, and in reality, State practice is different regarding this issue. The theory and practice of the principle of non-refoulement is not the same, particularly in the case of boat refugee. Further, in practice, State sovereignty, State policy and national security always get privilege over customary international law.

As a result, I will try to clarify the principle of non-refoulement including the exception, more particularly arrival of asylum seekers by boat (boat refugees) and state practice of the principle by costal State (i.e. US, Australia & Thailand)

What is the Principle of Non-Refoulement?

The principle of non-refoulement is the cornerstone of asylum and of international refugee law. Non-refoulement has been defined in a number of international refugee instruments, both at the universal and regional levels. At the universal level the most important provision in this respect is Article 33 (1) of the 1951 Convention relating to the Status of Refugees, which states that:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

In fact, respect for the principle of non-refoulement requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees.

Exceptions to the Principle of Non-Refoulement

While the principle of non-refoulement is basic, it is recognised that there may be certain legitimate exceptions to the principle.

Article 33 (2) of the 1951 Convention provides that the benefit of the non-refoulement principle may not be claimed by a refugee. According to the Article-33(2) refugees can exceptionally be returned on two grounds: (i) in case of threat to the national security of the host country; and (ii) in case their proven criminal nature and record constitute a danger to the community.

Measures not amount to refoulement

Professor Goodwin Gill, in his legendary text 'The Refugee in International Law' (1996), expressed the view that the core meaning of non-refoulement requires States not to return refuges in any manner whatsoever to territories in which they face the possibility of persecution. But States may deny admission in ways not obviously amounting to the breach of the principle. For example, stowaways and refugees rescued at sea may be refused to entry; refugee boats may be towed back out to sea and advised to sail on; and asylum applicants can be sent back to transit.

At the present circumstances we notice, Rohingya refugees are fleeing into territory of Bangladesh by boat. In this scenario, arrival of asylum seekers by boat puts at issue not only the interpretation of non-refoulement, but also the extent of freedom of navigation and coastal State's right to control its territories.

Principle of State Sovereignty & Refugee Protection

States are entitled to control immigration under principle of State sovereignty. Immigration control presupposes two prerogatives: denying or blocking access to state territory. At the same time, immigration control as an expression of State sovereignty is subject to the principles and norms of international human rights law. However, immigration control and human rights protection come into conflict when asylum seekers flee their countries and try to find safe shelter.


PHOTO: MSMBC.COM

Potential countries of asylum are often unwilling to offer protection. In fact, they actually try to prevent asylum-seekers from reaching their territory as well as return those who have managed to enter. When States implement such security mechanisms, no distinction between refugees and other immigrants is made.

It is well accepted norm that there is no international recognition of the right to be granted asylum of universal scope. Therefore, the practices applied by states to block potential access to their territory because of national security. State interception of asylum-seekers on the high seas is an example of such a practice.

State Practice on Arrival of Refugees by Boat

The United States' practice of returning asylum-seekers from Haiti is an example of denying access to state territory. It is also an example of how states can exercise extraterritorial jurisdiction and, after that, claim that they are not responsible for the actions of their officials (Coast Guard) committed outside national borders. In the Sale v. Haitian Centers Council President Bush government argued that the 1951 Convention did not apply to refugees on the high seas because they were outside U.S. territory. The Haitians challenged President Bush's policy. It was argued that President Bush's policy violated the 1951 Convention. The majority of the USA Supreme Court held that 1951 United Nations Convention Relating to the Status of Refugees does not apply to actions taken by the Coast Guard on the high seas. Accordingly, in the opinion of the majority, the non-refoulement principle embodied in Article 33 (1) from the Refugee Convention is inapplicable outside USA borders. The idea was that States are not responsible for human rights violations committed by their agents in so-called international zones.

Further, in the case of rescued asylum-seekers constitutes a problem for the following reasonsthe asylum seekers do not want to go back to their countries of origin and at the same time no other state is obliged to accept them in its territory. It is not clear which state is responsible to review their applications for asylum. Without specific procedure the principle of non- refoulement cannot be ensured.

In Australia, the incident of the Norwegian ship MV Tampa and Australia's unwillingness to accept asylum-seekers on its territory illustrates how asylum-seekers rescued at sea fall into a legal limbo. The pending questions at the time of the incident were if Tampa was entitled to enter Australian territorial waters and port and whether Australia had any obligation regarding the rescued individuals who wanted to submit applications for asylum in Australia.

After rescuing asylum-seekers in distress at sea, Tampa was not allowed to enter Australian territorial waters and port. The position of Australia was that Tampa carried individuals, who intended to enter Australia illegally, which amounts to breach of the conditions for admission under immigration law & coastal law.

In Thailand, Rohingya refugees who enter Thailand by boat are either detained by the Thai authorities and remain in detention indefinitely or are intercepted by Thai authorities, and risk being pushed back to sea, something which has happened multiple times in the past. The few who manage to enter Thailand would not be able to acquire legal status as Thailand is not a signatory to the 1951 Refugee Convention and does not have domestic asylum laws.

In conclusion, it could be said that State practice of the principle of non-refoulement regarding the boat refugees is very complicated issue. One side, the principle of non-refoulement assures the guarantee of refugee's right, and alternatively, under Article 33(2) of the 1951 Convention State may reject the refugee application and restrict their entry into the territory because of national security and State policy. Furthermore, in practice, State sovereignty, limited resource and national security always get privilege over the customary international law. Tanzania, for example, cited national security, regional tension and environmental damage as reasons why it could accept no more refugees. One can hardly expect, a small State like Bangladesh with limited resources, which is already coping with large numbers of refugees, to accept on its own another mass influx. Finally, it is the responsibility of the international community to pressure Myanmar to resolve the Rohingya refugee problem that Bangladesh has been carrying for last 20 years.

The writer is Assistant Professor, Department of Law & Justice, Southeast University.

REVIEWING THE VIEWS

Review on daughter's right of inheritance in Muslim Law

TANZIM ALAM

THE debate aroused in this page regarding the law commission's report on the 'possible increase of daughter's share in the succession of parent's property in the absence of son' has drawn attention of the readers. After publishing the report in the Daily Star on 9th June, Mr. & Mrs. Mondol's writing on this page titled 'Law commission's report revisited' on 16th June simultaneously welcomed the report and criticized it for some default according to the writers' view. Later on, another essay on the same issue strongly criticized the former one which was published in this very page on 30th June.

However, after going through the law commission's report, I breathed a sigh of relief and firmly believe that many parents who have only daughters and no son will do the same. I think this report will pave the way to implement a law regarding the family property in a modern context.

The report argued that if the daughter of the predeceased son of the propositus can get the whole property under the MFLO, then why she cannot inherit her father's property wholly without disposing any portion to the collaterals of her father in the absence of her brother.

I think this is a growing demand of present time that should be considered carefully. Firstly, we should keep in mind that the social and legal reform initiated by Islam put an end to so many unjust customs and usages and gave inheritance rights to the disadvantaged members of the family. We all know the very fact that the focus of modern family tie centers upon the nuclear family comprising of the parents and their lineal issues. So, in this context the patriarchal society of the past, where the uncles took the responsibility of the children of their deceased brother, cause hardship and injustice to the members of inner family with the breakdown of ties of extended family.

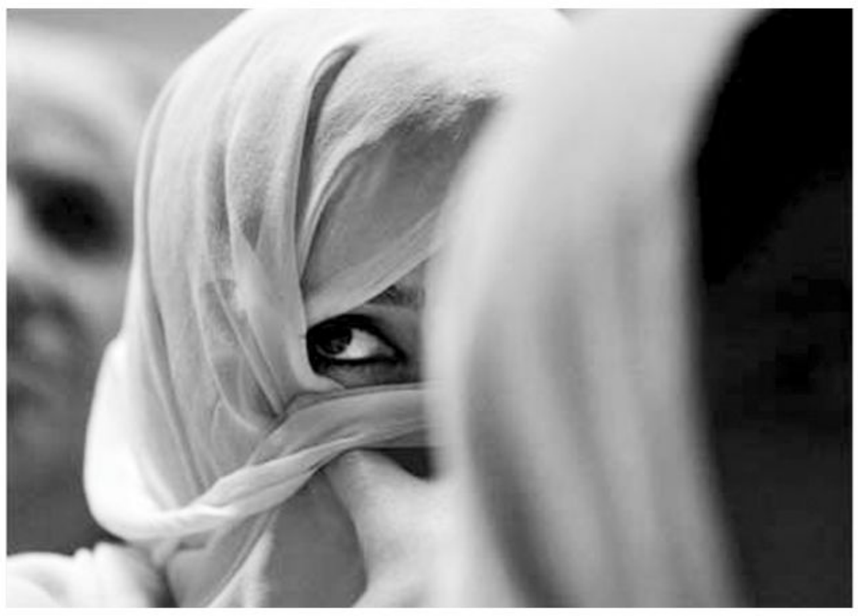
The Quranic verse (4:176) mentioned in the report and the liberal interpretation of the Indonesian Supreme Court of this verse is a decision befitting the time.

In the Law commission's report, it is mentioned that, ' the liberal meaning of the Arabic word "Al- khalala meaning child'. This is not true and it is wrongly inserted here. Because the actual meaning of the word kalala means 'childless' and in the Surah An-Nisa, verse: 176 Allah ordained that:

They ask you for a legal verdict. Say:"Allah directs (thus) about Al-kalalah (those who leave neither descendants nor ascendants as heirs)..[Translated by Muhsin Khan]

Rather it can be said that the word 'walad' (meaning child; male/female) mentioned the same verse should be interpreted for both male and female child. By this interpretation, the collaterals of the propositus would be excluded from the property of any deceased person who left daughters only.

The question may arouse, whether this is in contradiction with the Shariya law or not. Debates may also be continued between the conservatives and the modernists. In this context,



we should remind ourselves that Ijtihad is the only channel of legal development which must be based on Quran and Sunnah , with legal reasoning.

Lastly, I want to say something about the essay published in this page on 30th June titled 'Law Commission's proposal to increase daughter's share in the succession' by Mr. Anisur Rahman. I express my gratitude to him as he is a strong supporter and collaborator for advocating such epoch-making approach.

The essay provides a line that "the principle 'male will get double of female lies to the first verse of Sura 7 of the Holy Quran." I hope this may be a printing mistake because the point is not true and the right one is that this is Sura no.4 (An-Nisa) verse no. 11. This rule (double share of male) is commonly known as 'Tasib rule' which is a very fundamental principle of Muslim Law of Succession. Every male will get double share of a female of equal degree and it has a general application in every distribution of property.

He described two situations, and distributed the deceased's property, which was not in a right way and also vitiated the very fundamental of succession law.

Firstly, he drew a situation where the propositus has a daughter (D) and one full brother (FB) and one son's daughter (SD). Here, the daughter will get 1/2 of the property, the son's daughter 1/6 and FB will get the residue 1/3 of property as agnatic sharer. He argued that here FB does not get double of D. There is no rule of succession in Shariya law that 'male will get double of female' means all males are in a higher position than all females. It is only applied in case of same degree. So I think this discussion is quite irrelevant.

The next situation where the propositus has mother, father and brother, Mr. Anisur Rahman said that the father is not getting the double of the mother. This is not true. His distribution of property among the sharers and residuary is completely wrong because a brother can never get any property in the presence of the father. Here, father will exclude the brother from the property. Then mother will get her Quranic share of 1/3 and the father will get 2/3 of the property as residuary. The very reason behind the making of a female relative of the deceased as agnatic sharer in the presence of a male of equal degree, is not to treat them equally. Rather, it is for the true application of the Rule of Tasib (rule of double share).

Lastly, the proposal of the Law Commission is praiseworthy, no doubt. The implementation of this report is also necessary in the modern social context. Obviously it is true that humanity and discrimination does not go together. Islam is itself a highly equitable, humanistic religion and there is no discrimination in Islam. Before raising our voice to eliminate all sorts of discrimination to make the Islamic law equitable one, we should read out the law in an interrelated way and not severally.

The writer is a student of L L.M at University of Rajshahi.